

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DIEKMAN : CIVIL ACTION

Plaintiff :  
v. : FILED OCT 17 2002  
: 02-4681

ENERGY CHOICE MARKETING, INC., : NO. 02-4681  
ET AL.

Defendant :

**MOTION TO DISMISS  
COUNT I OF DEFENDANT'S COUNTERCLAIM FOR FAILURE TO STATE  
A CLAIM OR IN THE ALTERNATIVE  
MOTION FOR MORE DEFINITE STATEMENT**

For reasons set forth in the within Motion, Plaintiff requests that the  
aforementioned Count I be DISMISSED.

Dated: October 17, 2002

Respectfully submitted,

RYAN, BROWN, McDONNELL,  
BERGER & GIBBONS, P.C.

By Michael T. McDonnell

Michael T. McDonnell, III  
Attorney I. D. No. 60111  
Attorney for Plaintiff  
John Diekman

1600 Market Street, 14<sup>th</sup> Floor  
Philadelphia, PA 19103-7240  
(215) 561-3800

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DIEKMAN : CIVIL ACTION

Plaintiff :  
v. :  
Defendant :

ENERGY CHOICE MARKETING, INC., : NO. 02-4681  
ET AL.

Defendant :

**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS**

Plaintiff John Diekman filed a Complaint naming as Defendants Energy Choice Marketing ("ECM"), Consumer Choice, Inc. ("CCI") (the successor in interest to ECM, Shai Fishman and S & D Marketing.

Defendants have responded by way of counterclaim that there has been fraud and misrepresentation. Defendants have alleged in boilerplate terms that there has been fraud and misrepresentation. Defendants have failed to allege with the requisite particularity those facts necessary to state a cause of action for fraud and misrepresentation.

The totality of the factual predicate was that Diekman represented that he had expertise in door-to-door sales including developing sales, scripts, opening offices, recruiting sales personnel and initial and ongoing training ¶ 62. Defendants further

Defendants fail to allege facts to contradict these assertions. They have failed to point out how these assertions were false and misleading. Indeed, there is no fact or facts which might contradict their representation or demonstrate their falsity.

In all respects, Defendants counterclaim fails the requisites of Fed. R.C.P. Rule 9 that such particularities be present to allow the Court to assess the validity of the plea.

WHEREFORE, Plaintiff requests that the Counterclaim be dismissed and that the Motion for More Definite Statement be granted as the pleading is so vague and lacking content that Plaintiff cannot fashion a meaningful response.

Dated: October 17, 2002

Respectfully submitted,

RYAN, BROWN, McDONNELL,  
BERGER & GIBBONS, P.C.

By

  
\_\_\_\_\_  
Michael T. McDonnell, III  
Attorney I. D. No. 60111  
Attorney for Plaintiff  
John Diekman

1600 Market Street, 14<sup>th</sup> Floor  
Philadelphia, PA 19103-7240  
(215) 564-3800

**CERTIFICATE OF SERVICE**

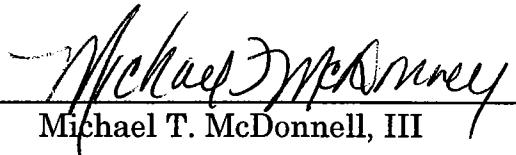
I hereby certify that a true and correct copy of the MOTION TO DISMISS  
COUNT I OF DEFENDANT'S COUNTERCLAIM FOR FAILURE TO STATE A  
CLAIM OR IN THE ALTERNATIVE MOTION FOR DEFINITE  
STATEMENT/MEMORANDUM OF LAW IN SUPPORT was made on counsel listed  
below:

Stephen G. Burns, Esquire  
BURNS & KASMEN  
The Pavilion, Suite 630  
261 Old York Road  
Jenkintown, PA 19046



Dated: October 17, 2002

RYAN, BROWN, McDONNELL,  
BERGER & GIBBONS, P.C.

By   
Michael T. McDonnell, III